IPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1377

MARRA BROS., INC.,

Petitioner,

against

JACK LONGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Counterstatement of Questions Presented	1
Argument	2
Conclusion	7

Table of Cases

Cavelleri v. *Isthmian Lines, Inc.*, 189 F. Supp. 525; 190 F. Supp. 801	4
Cusumano v. *Wilhelmsen*, 267 F. Supp. 164	5
DeGoia v. *U. S. Lines Co.*, 304 F. 2d 421	4, 5
Grillea v. *U. S.*, 232 F. 2d 919	3
Johnson v. *Partrederiet Brovigtank*, 202 F. Supp. 859	3, 4, 6
McLaughlin v. *Trelleborgs*, U. S. C. A. 2d Cir. (January 30, 1969)	6
Nicroli v. *Den Norske, etc.* v. *International Terminal Operating Co., Inc.*, 332 F. 2d 651	4, 5
Ryan Stevedoring Co. v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232	5
Seas Shipping Co. v. *Sieracki*, 328 U. S. 85	3
U. S. v. *Gilman*, 347 U. S. 507, 74 S. Ct. 695	4

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Counterstatement of Questions Presented

1. Where a stevedore-employer has been held liable to indemnify a shipowner because of the former's breach of warranty of workmanlike performance arising out of a contract between them, should the employer be permitted to obtain indemnity from its employee who is not a party to the contract?

2. Should the doctrine of comparative negligence as it has been applied heretofore in a maritime case be changed so that contributory negligence becomes an absolute bar to an action by a longshoreman against a shipowner in

order to save a stevedore-employer from the effects of the terms of a contract he alone has entered into with a shipowner?

Respondent, Longo, employed as a longshoreman by Petitioner, Marra Bros., Inc., a stevedore, brought action against Lehigh Valley Railroad to recover damages for personal injuries he sustained on Lighter #357. Lehigh impleaded Wm. Spencer & Son Corporation claiming indemnity under a written contract and Spencer cross claimed against Marra seeking indemnity under a contract in which Marra agreed to perform stevedoring operations, with an implied warranty to perform such work in a workmanlike manner. The jury found the lighter unseaworthy and awarded damages to Longo against Lehigh, but also found Longo was contributorily negligent. The lower Court directed a verdict in favor of Lehigh against Spencer under their written contract of indemnity and found Marra in turn liable to Spencer for its failure to perform the stevedoring work in a workmanlike fashion. The Court dismissed Marra's counterclaim against its employee, Longo.

Argument

There is no basis in fact or law in this maritime case for the stevedore-employer's counterclaim against its employee.

Petitioner bases its appeal on so-called "Common Law" and the "Plight" of the stevedore. It further seeks to distinguish this appeal from other cited cases on the claim that it became liable here "Solely" because of the negligence of the plaintiff.

Appellant is wrong on all positions taken.

There are several basic principles which apply in Maritime cases:

1. The Rule of Comparative Negligence applies.

   Grillea v. *U. S.*, 232 F. 2d 919.

2. This Maritime case is not based on Common Law. The Courts and Congress have thoroughly recast the Common Law relationships of employer and employee in the shipping industry by altering the nature of liability for accidents to longshoremen.

   Johnson v. *Partrederiet Brovigtank*, 202 F. Supp. 859;
   Seas Shipping Co. v. *Sieracki*, 328 U. S. 85.

3. A prime consideration in the development of the expanded rights of a longshoreman in Maritime actions is the humanitarian policy of distributing the loss in the shipping community which receives the service and which should bear its cost.

   Seas Shipping Co. v. *Sieracki, supra;*
   Grillea v. *U. S., supra.*

The very concept of comparative negligence implies that a longshoreman may recover even if his negligence contributes in part to his injury. The liability of the shipowner extends even to a longshoreman who is injured by an unseaworthy condition created by him.

Grillea v. *U. S., supra.*

Were appellant's contention sustained, the rule of comparative negligence would no longer be applicable—for not only would the longshoreman's recovery be reduced by his negligence, but he would have judgment against him for the amount of recovery, plus attorney's fees. In effect, contributory negligence of the slightest extent would be

an effective bar to any recovery for a Maritime tort however gross the injury or nature of the unseaworthy condition complained of. The Courts have repeatedly recognized this possible result and therefore have not sustained the counterclaim urged here.

Nicroli v. *Den Norske, etc.* v. *International Terminal Operating Co., Inc.*, 332 F. 2d 651;
Johnson v. *Partrederiet Brovigtank, supra;*
Cavelleri v. *Isthmian Lines, Inc.*, 189 F. Supp. 525, 190 F. Supp. 801.

The policy considerations related to risk distribution in the shipping industry and the determination basic to our concept of the Maritime Law not to impose the risk of such a hazardous calling on the injured longshoreman has also been repeatedly cited as a reason for refusing to sustain such a counterclaim.

Nicroli v. *Den Norske, etc.* v. *International Terminal Operating Co., Inc., supra;*
Johnson v. *Partrederiet Brovigtank, supra;*
DeGoia v. *U. S. Lines Co.*, 304 F. 2d 421.

Our current enlightened interpretation of the law is to take policy considerations into account. In *U. S.* v. *Gilman*, 347 U. S. 507; 74 S. Ct. 695, the Supreme Court in an action brought under the Federal Tort Claims Act, rejected the government's contention that it was entitled to indemnification from tortious employees, on the ground that to allow this would involve serious considerations of financial ability, efficiency and morale.

With respect to the "Plight" of the stevedore-employer, his liability arises out of the nature of the contract he enters into with the shipowner. The Third-Party Complaint by a shipowner against the stevedore is based on

such contract, which was entered into voluntarily by such parties.

Ryan Stevedoring Co. v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232.

A stevedore by contractual stipulation may limit his liability for indemnification.

DeGoia v. *U. S. Lines Co., supra.*

This agreement between shipowner and stevedore is not one to which the longshoreman is a party and he should not become liable to the stevedore because of the latter's obligations assumed under such contract.

Nor do the Common Law cases cited by petitioner pertain to a situation where the employee is injured. To be applicable, they would presuppose facts showing no liability on the part of the shipowner, but a tortious act by longshoremen causing injury or damage to shipowner, who sues the stevedore-employer not pursuant to contract. This, of course, is not the basis of our lawsuit. To begin with, the wrongdoing stems from the unseaworthiness of shipowner's vessel and his negligence, resulting in injury to the employee. The third-party defendant-stevedore is brought in because of their contract with shipowner.

The petitioner recognizes (p. 12 of its Brief), that the prevailing law on this subject is that followed by Judge Tenney in *Cusumano* v. *Wilhelmsen,* 267 F. Supp. 164. There the longshoreman was contributorily negligent and the stevedore attempted to distinguish this case from the facts in *Nicroli* v. *Den Norske, etc.* v. *International Terminal Operating Co., Inc., supra.* Judge Tenney held that contributory negligence would be sufficient to charge the stevedore with the breach of its warranty of workmanlike service. He further held that regardless of inequities that exist between stevedore and shipowner, neither law nor

public policy authorizes recovery over by the employer-stevedore.

The petitioner's approach is the same on this appeal as the stevedore took in the *Cusamano* case. They translate the facts and decision of the Trial Judge in our case to mean that their responsibility is solely due to the acts of the plaintiff-employee. This is simply not the case. Were there no contract of the kind entered into by petitioner there would be no Third-Party Complaint against them here. The claim over against the stevedore-employer states specifically that petitioner agreed to perform certain stevedoring operations and that by so contracting, impliedly warranted to perform such work in a workmanlike manner. Thus, the basis of their liability was not negligence, but contract.

Reference is made by petitioner to assault cases on board ship and the rights of the shipowner under those circumstances. Such cases are neither analogous nor pertinent and proceed on different principles.

Johnson v. *Partrederiet Brovigtank, supra.*

In *McLaughlin* v. *Trelleborgs,* decided January 30, 1969 in the U. S. Court of Appeals for the Second Circuit, the lower Court had dismissed the counterclaim and Judge Friendly, who wrote the opinion in the Circuit Court, stated (p. 9-A, Petitioner's Appendix)

> "This last ruling was demanded by *Nicroli* v. *Den Norske Afrika—OG Australielinie,* 332 F. 2d 656 (2 Cir. 1964), and we shall say no more concerning the portion of Golten's appeal that relates to it."

The language used to dismiss the counterclaim well shows the settled position of the Second Circuit.

Conclusion

The counterclaim for indemnity against an employee urged by Petitioner is contrary to law and the humanitarian policy and intent of distributing in the shipping community the losses arising from the hazards of the maritime occupations. To place the burden of the losses of this industry on the employees would be a retrogression in social concept and unconscionable. The liability of the stevedore-employer is not derivative from any negligence of the employee, but is based on the terms of the contract between such employer and shipowner. The basic concept of Maritime Law, including its Rule of Comparative Negligence, should not be emasculated to protect a stevedore-employer from the operation of the terms of its own agreement. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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